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In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES R. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43-51) is reported at 541 F. 2d 710. The judgment (App. A, *infra*, p. 1a)[1] and findings of fact and conclusions of law (App. B, *infra*, pp. 2a-8a) of the district court, which are set forth in the appendix to this brief, are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90-91) was entered on September 28, 1976. The petition for a writ of certiorari was filed on November 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "App." refers to the appendix to this brief. "Pet. App." refers to the appendix to the petition.

QUESTION PRESENTED

Whether the district court's findings that the chief executive and sole stockholder of a corporation, who was personally subject to a Federal Trade Commission consent order enjoining certain sales practices, had not made good faith efforts to halt those practices, were clearly erroneous.

STATUTE INVOLVED

Section 5(*l*) of the Federal Trade Commission Act, as amended, 87 Stat. 591, 15 U.S.C. (Supp. V) 45(*l*), is set forth as Appendix C of this brief.

STATEMENT

On July 29, 1969, the Federal Trade Commission entered a consent order prohibiting certain unfair or deceptive practices in the sale of home study and resident electronic data processing courses by the Technical Education Corporation (TEC), its officers, and petitioner Charles R. Johnson, both as an individual and an officer of TEC (App. B, *infra*, p. 2a). Mr. Johnson was the chief executive officer, treasurer, and sole stockholder of TEC (*id.* at 6a).

The United States filed a civil complaint against Mr. Johnson on August 14, 1974 (Pet. App. 53-86) under Section 5(*l*) of the Federal Trade Commission Act,[2] 15 U.S.C. (Supp. V) 45(*l*), seeking both civil penalties and injunctive relief for violations of the Commission's order. In his answer to the complaint, Johnson admitted that he "formulated, directed and controlled the acts and practices of the corporation" at all times material to the complaint (Pet. App. 54, 88).

The case was tried to the court, which found that petitioner had violated the consent order (App. B, *infra*

[2]TEC was not named as a defendant. A secured creditor had seized the assets of TEC in late 1973. Although the corporation has not been dissolved or adjudicated a bankrupt, petitioner Johnson testified that it has no assets apart from a tax refund claim (Tr. of Trial 185-186, 208-209).

pp. 2a-6a). Pursuant to a stipulation, the court admitted into evidence affidavits of 20 individuals to whom the TEC sales presentations had been made. Each affiant stated that TEC sales representatives solicited their enrollment through a sales presentation which violated at least two and as many as six provisions of the Commission's order (GX 3-22; Tr. of Trial 2, 5).[3]

The affidavits revealed that the violations had been widespread and not limited to a few salesmen or a particular geographic area. The affidavits and other evidence demonstrated that the company made a systematic effort: to mislead prospective purchasers of the course into believing that TEC relied upon aptitude test scores in selecting students, and that jobs were available for those who took the course; to misrepresent the significance of state licenses; and to pressure prospective purchasers to sign contracts by telling them the salesmen would not return if they did not sign at the time of the visit (GX 3-22, 24B, 24F; Tr. of Trial 32-33, 35-37, 105-106, 135-136; App. B, *infra*, p. 7a).

The district court entered judgment against petitioner on each of the 20 counts, and imposed a penalty of $2,000 on each count, for a total of $40,000 (App. A, *infra*, p. 1a). It also permanently enjoined petitioner from violating the Commission's order (App. A, *infra*, p. 1a). The court concluded that petitioner was responsible for the acts of the TEC salesmen, that he made no effort to explain the import of the order or to enforce its provisions with salesmen in the field, and that providing them with copies of it did not constitute compliance (App. B, *infra*, pp. 7a, 8a).

The court of appeals unanimously affirmed. It held that as founder, owner and operator of TEC, Johnson had an affirmative duty to assure compliance with the order (Pet. App. 46), and that in the entire context of TEC's operations,

[3]"GX" refers to government exhibits in the district court. Exhibits 3-22 and 24B were also reproduced in the Supplemental Appendix before the court of appeals, pp. 7-110.

merely giving each salesman a copy of the order was not enough to constitute a good faith effort to comply (Pet. App. 47).

ARGUMENT

The decision of the court of appeals is correct; it is consistent with the decisions of this Court and of the other circuits; and it does not warrant review by this Court.

The petitioner's assertion that the "judgment of the district court imposes a standard of strict liability upon the officers of a corporation" (Pet. 39) misconstrues the nature of the decision. The Commission's order ran against Johnson individually and as a corporate officer and thus gave him notice that he was required to assure compliance by his corporation.[4] The court of appeals merely held that Johnson had affirmative obligations under the Commission's order to take effective steps to insure compliance with that order by his corporation[5] and concluded that the district court did not err in finding that he had failed to fulfill those obligations.

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[4]Although petitioner states that "[t]he question of his [Johnson's] inclusion in the Order is really not before the Court" (Pet. 31), the petition nonetheless implies that the Commission acted improperly in naming Johnson as an individual respondent in the original order. The Commission properly did so. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 119-120.

[5]The conclusion that the Commission's order imposes affirmative obligations upon corporate officers is accepted law. Corporate officers have been subjected to criminal contempt liabilities for failing to fulfill such obligations. See *In re Holland Furnace Company*, 341 F. 2d 548 (C.A. 7), certiorari denied *sub nom. Holland Furnace Co.* v. *Schnackenberg*, 381 U.S. 924, rehearing denied, 382 U.S. 873, affirmed on other grounds *sub nom. Cheff* v. *Schnackenberg*, 384 U.S. 373; *In re Dolcin Corporation*, 247 F. 2d 524 (C.A. D.C.), reconsideration denied, 247 F. 2d 532, certiorari denied *sub nom. Dolcin Corp.* v. *United States Court of Appeals for the District of Columbia Circuit*, 353 U.S. 988; cf. *United States* v. *Park*, 421 U.S. 658.

Petitioner's assertion that "[t]here was nothing more that Johnson could humanly do to insure the corporation's compliance with the Federal Trade Commission's order" (Pet. 40) is belied by the record. It reveals that petitioner, in fact, did very little to alter the sales practices which the decree was designed to eliminate. The district court found that Johnson made no effort to enforce the order apart from sending copies of it to the salesmen (App. B, *infra*, p. 7a). The court of appeals carefully reviewed the record and held that finding to be correct, noting (Pet. App. 47): "[W]e are not persuaded that Johnson in good faith did everything in his power as the chief executive of T.E.C. to assure compliance with the F.T.C. order." There is no reason for this Court further to review these factual findings by the two courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

CARL D. LAWSON,
PETER L. DE LA CRUZ,
Attorneys.

JANUARY 1977.

DOJ-1977-01

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

CHARLES R. JOHNSON, DEFENDANT.

No. 74-572 C (1)

JUDGMENT

Findings of fact and conclusions of law dated this date are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that a judgment is rendered for the plaintiff and against defendant on each of the twenty counts of the complaint and the defendant is fined $2,000 on each count, or a total of $40,000.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant Charles R. Johnson be and is hereby permanently enjoined from violating the order of the Federal Trade Commission, dated July 29, 1969, which became final on October 6, 1969.

Costs are assessed against the defendant.

Dated this 20th day of November, 1975.

/s/ James H. Meredith

United States District Judge

FILED

NOV. 21, 1975

WILLIAM D. RUND, Clerk
U.S. District Court
E. District of Mo.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

CHARLES R. JOHNSON, DEFENDANT.

No. 74-572 C (1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried to the Court without a jury. The Court has been fully advised and makes the following findings of fact:

FINDINGS OF FACT

1. The United States of America, acting upon the certification to the Attorney General by the Federal Trade Commission, brings this action under 15 U.S.C. 45(1), 49, and 408(c), to recover civil penalties for a violation of an order to cease and desist issued by the Commission on July 29, 1969, which became final on October 6, 1969.

2. The order contained the following language:

> "IT IS ORDERED that respondents Technical Education Corporation, a corporation, and its officers, and C. R. Johnson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study and instruction in the field of data processing or any other subject in commerce,

as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> "(1) Representing, directly or by implication, that employment is being offered when the real purpose of such offer is to obtain leads to prospective purchasers of respondents' course.
>
> "(2) Representing, directly or by implication, that respondents or their school are sponsored by, approved by or have any connection with the International Business Machines Corporation (IBM) other than to provide training or instruction in the operation of equipment manufactured or distributed by IBM; or misrepresenting, in any manner, the status or affiliation of respondents, their school or their sales representatives.
>
> "(3) Representing, directly or by implication, that respondents' school is licensed or registered in any state unless it is so licensed or registered and unless in immediate connection with such representation respondents clearly and conspicuously disclose the meaning, if any, of such licensing or registration; or misrepresenting, in any manner, the import or effect of licensing, registration or any other action by a state or other jurisdiction.
>
> "(4) Representing, directly or by implication, that persons who complete respondents' courses are guaranteed or assured of employment in the positions for which they have been trained; or misrepresenting, in

any manner, the ability, efforts or facilities of respondents or their placement service for assisting persons completing respondents' courses in obtaining employment.

"(5) Representing, directly or by implication, that an aptitude or other test is adequate to measure the aptitude or ability of an enrollee to successfully complete respondents' course and attain the advertised objectives of the course unless such test is based upon established personnel testing practices in the data processing field; or misrepresenting, in any manner, the selectivity exercised by respondents in enrolling students in their courses or the qualifications which students must possess to be accepted for enrollment.

"(6) Representing, directly or by implication, that a prospective student may enroll in respondents' home study courses only at the time of the visit by respondents' sales representative or that if the student is not enrolled at the time the opportunity to enroll will have been lost; or misrepresenting, in any manner, that the opportunity to enroll in respondents' courses is limited.

"(7) Inviting or obtaining inquiries concerning respondents' courses from prospective students without clearly informing such persons reasonably in advance thereof that respondents' sales representative will call upon them and seek to enroll them in one of respondents' courses.

"(8) Failing to:

(a) Furnish to prospective students at time of enrollment a printed statement clearly and conspicuously disclosing (1) the exact terms and conditions under which a student may discontinue his or her enrollment prior to completion of the course in which enrolled and (2) such refund of money, if any, or other adjustment that respondents will make in the obligation of the student who requests withdrawal or discontinuance in accordance with respondents' terms and conditions therefor.

(b) Set forth the disclosures required by (a) preceding clearly and conspicuously in and as a part of the enrollment application or such documents as may be executed by prospective purchasers of respondents' courses.

(c) Require their sales representatives or other persons who visit prospective purchasers of respondents' courses and solicit their enrollments in respondents' courses to orally inform and advise prospective purchasers of the information required to be disclosed by (a) and (b) preceding.

(d) Clearly and conspicuously disclose to prospective purchasers of respondents' courses prior to enrollment that the collection of student accounts may be undertaken by a

designated agency but that such action does not affect such rights to discontinuance or affirmative defenses as the student may have.

3. C. R. Johnson was the president of Technical Education Corporation from October 23, 1968, to the time of trial. He was also the chief executive officer, the treasurer, and the sole stockholder. The principal place of business of Technical Education Corporation was in St. Louis, Missouri, and defendant lived in St. Louis, Missouri, until recently. During the year 1969 gross sales of Technical Education Corporation were approximately $1,300,000; in 1970, $1,500,000; and in 1971, $4,900,000.

4. The method of operation of Technical Education Corporation was, basically:

(a) to place ads in the newspapers for programmers or to send direct mail to prospects after which a telephone call would be placed to the prospect and a salesman would call on the prospect. The salesman would sign up the prospect for a course of study which included an agreement to pay various amounts ranging from $495 to $1,390. The prospects also signed an application for a HEW student loan.

(b) Technical Education Corporation also had a boiler room operation where telephone operators would call prospects and ask if they would be interested in an $800 a month job or if they had a young relative who would like such a job.

(c) In some instances, the applicants took an aptitude test but the salesmen were instructed to pass all applicants if they could "walk and chew gum".

(d) The salesman stated that the applicant would have a good paying job immediately upon completion of the course and in many instances advised the applicant that there was a limited number of places and they must either sign while the salesman was with them or the opportunity would be lost.

5. The contracts were sold to various financial houses without advising applicants.

6. The government's action alleged a violation of the Federal Trade Commission order in twenty counts. The government sustained their burden of proof on each of the twenty counts by showing a violation of said order in one or more different ways by persons representing Technical Education Corporation.

7. Defendant did have sent to the various salesmen a copy of the Federal Trade Commission cease and desist order, had them acknowledge receipt of the same, and return that to the office. No effort was made, however, to explain the import of the order or to enforce its provisions with the various salesmen in the field.

8. The defendant testified that a loan company had taken over the lists, furniture, and assets of the Technical Education Corporation, but that no formal foreclosure had been accomplished. He testified that the Technical Education Corporation is not now doing business and that he has purchased a company which is distributing burglar alarms.

9. A penalty of $2,000 on each count, or a total of $40,000, will be assessed against defendant Charles R. Johnson.

CONCLUSIONS OF LAW

1. This Court has jurisdiction based on 28 U.S.C. 1331(a), 1337, 1345, and 1355.

2. The Federal Trade Commission decree was directed against both Technical Education Corporation and the defendant, who was responsible for the acts of the salesmen of Technical Education Corporation.

3. The fact that defendant Charles R. Johnson sent a copy of the cease and desist order of the Federal Trade Commission to his salesmen is not a defense to this action.

4. Defendant will be permanently enjoined from violating the terms of the Federal Trade Commission cease and desist order and fined a total of $40,000.

Dated this 20th day of November, 1975.

/s/ James H. Meredith

United States District Judge

Filed:

Nov. 21 1975

William D. Rund, Clerk
U.S. District Court
E. District of Mo.

APPENDIX C

Section 5(*l*) of the Federal Trade Commission Act, as amended, 87 Stat. 591, 15 U.S.C. (Supp. V) 45(*l*), provides that:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.